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No. 98-799

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

KAUTHAR SDN BHD,
Petitioner,

v.

MICHAEL A. STERNBERG, *et al.*
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF AMERICAN ASSOCIATION OF RETIRED PERSONS AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONER

The American Association of Retired Persons and Consumer Federation of America respectfully move for leave to file the accompanying brief as *amici curiae* in support of the first question presented in Kauthar Sdn Bhd's Petition for a Writ of *Certiorari* from the judgment of the U.S. Court of Appeals for the Seventh Circuit.

Pursuant to Supreme Court Rule 37.2, consent of the parties to the filing of the brief was sought through counsel. Counsel for Petitioner gave consent, but counsel for Respondents declined to do so.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a not-for-profit membership organization serving more than 32 million people aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP is very concerned about fraud in the securities industry. The Federal Trade Commission estimates that Americans lose more than $1 billion each year in fraudulent investments. Such practices can wipe out savings accumulated during a person's lifetime for use during retirement. Older people are frequent targets of fraud, since they often have significant assets and are concerned about supplementing the Social Security and pension benefits they will receive during retirement. AARP thus has made the need to combat securities fraud a high priority, and opposes efforts to limit federal statutory remedies that allow defrauded investors to obtain financial redress. The Association has been very involved in commenting on legislative and regulatory proposals that address this issue, and in educating

consumers about how to choose financial professionals and to make sure the people they hire act in the customers' best financial interest.

Consumer Federation of American (CFA) is a non-profit association organized in 1968 to advance the interests of consumers through advocacy and education. CFA's current membership is comprised of approximately 250 national, state, and local consumer groups throughout the United States which, in turn, represent more than 50 million consumers.

Recognizing the growing participation of American consumers in our nation's financial markets, CFA has made protecting the interests of individual investors a priority. The guiding principle behind CFA's work on these issues is that investors deserve effective protection from fraud, fair dealing from financial professionals, and full and timely disclosure of information relevant to their interests. In keeping with these concerns, CFA has supported federal and state legislative and regulatory initiatives on a broad array of investor protection issues, including financial planner regulation, penny stock fraud, abuses associated with limited partnership rollups, rights to redress for victims of securities fraud (both in court and through arbitration), industry compensation practices, and plain English disclosures.

These issues have grown in importance as the need to use stock investments to supplement Social Security and pension benefits has increased. While individuals increasingly must fund their own retirement plans, the growing complexity of the securities marketplace makes it more difficult for consumers to understand which investments are suitable for their short- and long-term financial goals. AARP and CFA thus are involved in efforts to combat the high levels of financial illiteracy common among individual investors. For example, AARP and CFA are among the original members of the Securities and Exchange Commission's (SEC) Consumer Advisory Panel, formed by Chairman Levitt to provide advice

on issues that affect individual investors, and both organizations participated on several expert panels as part of the SEC's "Savings and Investing" Week, to help educate investors about the basics of saving for retirement.

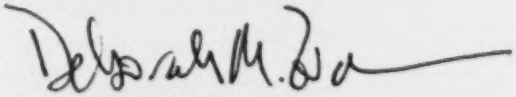
In April 1998, AARP conducted a survey of investor awareness of broker compensation practices. The survey revealed that investors do not have a basic understanding of the conflicts of interest that may arise because of brokerage industry compensation practices, such as sales contests or enhanced commissions for the sale of proprietary products. AARP released consumer education materials to help investors understand how the brokerage industry's compensation system may affect the returns they receive on their investments.

In addition, AARP has worked with the Federal Trade Commission to produce a guide entitled, "Facts About Financial Planners," which provides information and assistance to investors about how to find a professional who is qualified to provide financial advice. In 1995, AARP, CFA, and the North American Securities Administrators Association released a "Bulletin for Older Investors," which advised investors about how to map out their financial goals, select a financial professional, and understand basic investment terms. The Bulletin was directed toward the many relatively inexperienced investors who may be facing investment decisions for the first time, due to the receipt of a lump sum pension payment or proceeds from the sale of a home.

The interest of *amici* in this case stems from their positions among the leading consumer organizations in this country involved in matters concerning protecting investors from fraud, and the substantial interests at stake for their members and the consumers they serve. AARP and CFA believe that the holdings of various Circuit Courts, if allowed to stand, will have serious adverse consequences for individual

investors. *Amici* respectfully suggest that it will be useful to the Court, in reviewing the Petition for a Writ of *Certiorari,* to consider their views on the importance of correcting the appellate courts' refusal to follow this Court's precedent stating that discovery of the facts constituting a violation, i.e., actual notice of fraud, triggers the one-year statute of limitations in actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b) (West 1997), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1998).

Respectfully submitted,



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December 17, 1998

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BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1/]

The interest of *amici* is set forth in the preceding Motion for Leave to File this brief.

REASONS FOR GRANTING THE WRIT

The strength and stability of America's securities markets depends, to a large extent, on investor confidence in the fairness and efficiency of the marketplace. Critical to maintaining this confidence is the availability of effective remedies against those who violate federal statutory anti-fraud provisions. Congress recognized this when it enacted § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (West 1997), "'to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions[.]'" *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993), quoting *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). Many experts consider § 10(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1998), to be the core provisions of the federal securities laws that prohibit fraud against investors. For example, the Securities and Exchange Commission (SEC), which promulgated Rule 10b-5 under its authority to enforce the federal securities laws, has stated:

> As the law has developed, Rule 10b-5 is vastly more important in combating fraud than are the express remedies provided in the 1933 and 1934 Acts. . . . Section 10(b) and Rule 10b-5 have

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[1/] No counsel for any party authored any portion of this brief. No person or entity other than *amici*, their members, or their counsel has made a monetary contribution to the preparation and submission of this brief.

> come to embrace a diversity of claims which could not have been envisioned in 1934.

Br. *Amicus Curiae* of SEC at 23, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (No. 90-333).

While Congress did not expressly create a private cause of action under § 10(b), this Court has found that an implied right of action exists to encourage private enforcement of this anti-fraud provision. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) ("the existence of a private cause of action for violations of the statute and the Rule is now well established."); *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988) (private actions under § 10(b) "constitute[] an essential tool for enforcement of the 1934 Act's requirements."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 & n.10 (1983) (the existence of an implied private right of action is today "simply beyond peradventure."). Moreover, this Court and the SEC repeatedly have cited the availability of private lawsuits as critical to effective enforcement of federal securities laws, and to maintenance of investor confidence in the integrity, fairness, and efficiency of the securities marketplace. For example, this Court stated that private actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985), quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

The SEC has echoed this view. In testimony concerning litigation under the federal securities laws, SEC Chairman Arthur Levitt stated:

> The Commission has consistently stressed the importance of private actions under the anti-fraud provisions of the federal securities laws. In order to maintain investor confidence in the fairness of

> our securities markets, we must ensure that investors have a meaningful right to seek recovery against those who defraud them. . . . Preserving private actions as a source of deterrence and as the primary vehicle for compensating defrauded investors will be increasingly important as our securities markets continue to grow in size and complexity.

Securities Litigation Reform: Hearings Before the Subcomm. on Telecommunications & Finance of the House Comm. on Energy and Commerce, 103d Cong. 33 (1994) (testimony of Arthur Levitt).

The Director of the agency's Division of Enforcement expressed similar sentiments:

> Due to the Commission's inability to address all violations, the implied private right of action under Section 10(b) and Rule 10b-5 thereunder is critically important to the effective operation of the federal securities laws. . . . Given the continued growth in the size and complexity of our securities markets, and the absolute certainty that persons seeking to perpetuate financial fraud will always be among us, private actions will continue to be essential to the maintenance of investor protection.

Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong. 111,113 (1993) (testimony of William R. McLucas).

The federal appeals courts' use of inquiry notice to trigger the statute of limitations undermines the ability of defrauded investors to use this important tool, in direct contravention of this Court's holding in *Lampf*. Accordingly, *amici* urge the

Court to grant a writ of *certiorari* in order to reaffirm its ruling that the limitations period is triggered by actual notice and, thereby, to preserve court access for victims of securities fraud.

I. THE FEDERAL CIRCUIT COURTS' REFUSAL TO FOLLOW THIS COURT'S PRECEDENT APPLYING AN ACTUAL NOTICE STANDARD PLACES AN UNDUE BURDEN ON INDIVIDUAL INVESTORS.

A. Inquiry Notice Effectively Reduces An Already Short Statute of Limitations Period.

In *Lampf*, this Court was asked to determine the applicable statute of limitations for private actions brought under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Operating within a less than clear statutory framework, which does not provide for private claims and which contains several express causes of action each with its own limitations period, the Court nevertheless adopted a clear standard, namely, the one-year statute of limitations contained in § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e). The Court just as clearly held that the "1-year period, by its terms, begins after discovery of the facts constituting the violation . . . ." *Lampf*, 501 U.S. at 363.

Of particular importance to the current proceeding, the Court considered and expressly rejected the triggering mechanism contained in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m. Actions under that section must be brought "within one year after the discovery of the untrue statement or the omission, *or after such discovery should have been made by the exercise of reasonable diligence*. . . ." *Lampf*, 501 U.S. at 360 n.7 (emphasis added).

In so doing, the Court stated that the SEC had correctly noted that the

> periods contained in the 1934 and 1933 Acts differ slightly in terminology. To the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e).

Id. at 364 n.9.

Despite this clear language, federal courts of appeal continue to apply an inquiry notice standard. It is noteworthy, for example, that the Seventh Circuit specifically cited and then chose to override this holding. In *Tregenza v. Great American Communications Co.*, the Court stated that "Section 9(e), read literally, requires actual knowledge to set the statute of limitations running." 12 F.3d 717, 721 (7th Cir. 1993). A plaintiff must be aware of the facts that comprise the violation, "not merely enough facts to make a reasonable person suspicious and start looking for the facts constituting the violation." *Id.* The Court noted that § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, amended by Congress on the same day it enacted § 9(e) of the 1934 Act, requires that an action be commenced "'within one year after the discovery of the untrue statement or the omission *or after such discovery should have been made by exercise of reasonable diligence*.'" *Id.* The Court explicitly stated that *Lampf* held that § 9(e), not § 13, provides the limitations period for Rule 10b-5 actions, but nevertheless decided that courts are "free to apply to the section the judge-made doctrine of inquiry notice" because "[n]othing in the language, history, or purpose of section 9(e) forecloses so modest and traditional an exercise of judicial creativity." *Tregenza*, 12 F.3d at 722.

In refusing to follow this Court's clear rejection of an inquiry notice standard, the federal appeals courts transform the "slight" difference in terminology between § 9(e) and § 13 into a significant burden for investors. These Courts have imposed a duty to investigate, effectively reducing the statute of limitations and creating the real potential that defrauded investors will be precluded from bringing meritorious claims. Under this standard, the one-year statute of limitations may be triggered before investors have actual knowledge of a claim, creating an imposing hurdle for the investor who fails to file a complaint within one year of the first sign of trouble.

This also creates a "Catch-22" for potential plaintiffs who will need to get to the court on time, but also will have to survive a motion to dismiss based on their failure to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). This dilemma was exacerbated when Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. (West 1997)). The PSLRA adopted strict new pleading standards, *see* 15 U.S.C.A. §§ 77z-1(a) & 78u-4, and requires that a court dismiss a complaint when the plaintiff fails to meet these heightened requirements, *see id.* § 78u-4(b)(3)(A). These new requirements place potential plaintiffs in a very real bind: they must prepare a highly detailed complaint within a very short time period. The PSLRA also provides for a stay of discovery while a motion to dismiss is pending. *See id.* §§ 77z-1(b) & 78u-4(b)(3)(B).

In its analysis of the first year of practice under the PSLRA, the SEC found a decline in the number of lawsuits against secondary defendants, which it attributed, in part, to the combined effects of the pleading standards, discovery stay, and short statute of limitations. Office of the General Counsel, Securities and Exchange Commission, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995* at 23-24 (Apr. 1997). According to the SEC, one factor

contributing to this decline may be the inability of plaintiffs' attorneys to conduct discovery which might reveal misconduct by secondary defendants. *Id.* at 24. Secondary defendants are not being named in initial complaints, and

> because complaints are customarily met with a motion to dismiss, discovery can be stayed for a year or more after the complaint is filed. The Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, however, requires that class actions under Section 10(b) of the Exchange Act be brought within one year from the date that the plaintiff discovered the alleged fraud. As a consequence, plaintiffs may find it difficult to name secondary defendants in either the original or amended complaints.

Id. (footnotes deleted).

Replacing the actual notice standard that this Court articulated in *Lampf* with an inquiry notice standard thus worsens what already is a serious problem for investors. It is not reasonable to increase this burden, which places thousands of individual investors, who do not have a basic understanding of financial terms, let alone the intricacies of the marketplace, at a distinct disadvantage.

B. Individuals Are Investing in the Securities Markets in Unprecedented Numbers, Often For the First Time.

Demographic factors have caused considerable changes in participation in this country's securities markets. In the past, wealthy individuals and corporations were the primary investors in the stock market. That is no longer true, due to the combined effect of the baby boom generation's entry into adulthood, changes in retirement regulations and strategies,

and a stock market that, for the most part, has been producing incredibly high returns. We have entered a period in which Social Security provides proportionately less of needed retirement income, and traditional employer-sponsored pension coverage has decreased. As a result, individual savings and investments are increasingly important and substantially at risk. Americans have departed, in unprecedented numbers, from their historic practice of placing primary reliance on federally-insured products, such as savings accounts and certificates of deposit, for their retirement needs.

Today, more than 28 million Americans over the age of 65 rely to some extent on investment income, other than bank accounts, to meet their expenses. *See* American Association of Retired Persons, Consumer Federation of America, and North American Securities Administrators Association, *The Five Biggest Problems "Legitimate" Investing Poses For Older Americans*, Background Report, March 1995, at 2; *see also* Securities and Exchange Commission, *Summary of Comments and Discussion Regarding Protections for Senior Citizens and Qualified Retirement Plans*, July 8, 1996, at 3. Recent data from the U.S. Census Bureau indicate that three-fourths of all seniors derive at least 25% of their income from investments, and 10% of older people depend on non-bank investments for at least 50% of their income. *See The Five Biggest Problems "Legitimate" Investing Poses For Older Americans*, *supra*, at 2, and SEC *Summary*, *supra*, at 3.

This phenomenon is not limited to older people. Americans of every age group are increasingly investing in the stock market, through individual investments, self-directed pension or other retirement plans and, indirectly, through mutual funds. A recent survey released by the NASDAQ Stock Market reported that stock ownership among the general public has doubled in the past seven years, from 21.1% of adult Americans in 1990, to 43% in 1997. A majority of the investors are under age 50, and one-half of

them do not have a college degree. *Number of Investors Has Doubled to 43 Percent in Past Seven Years Finds Comprehensive Shareholder Survey*, NASDAQ Stock Market 1 (Feb. 21, 1997), citing Peter D. Hart Research Assocs. for The NASDAQ Stock Market, *A National Survey Among Stock Investors* (Jan. 1997).

Commenting on record levels achieved on major stock exchanges, SEC Chairman Levitt also has noted the vast growth in individual investments:

> It is not surprising then that public participation in our securities markets has grown to record levels. Mutual fund assets ($135 million in 1980) are now a record $3.7 trillion, surpassing the $2.6 trillion that Americans have on deposit at commercial banks. As recently as 1980, only one in 16 households invested in mutual funds; today that number is more than one in three, as we have evolved from a nation of savers into a nation of investors.

Fraud In The Micro-Capital Markets, Including Penny Stock Fraud: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 105th Cong. 112, 113 (1997) (testimony of Arthur Levitt).

In this environment, Americans' investment income depends not merely on their ability to save, but also on their ability to invest wisely and safely. Unfortunately, that ability is not always within their control. In fact, stock market highs such as those we have recently enjoyed frequently are accompanied by increased, often difficult to detect, fraud. As Chairman Levitt recently stated:

> With this vast expansion in our markets and in public participation in those markets, we would expect to see an increase in the incidence of

> fraud. We have particularly seen an increase in abuses in the market for micro cap securities, which . . . provides opportunity for fraudsters to prey on innocent investors.

Id. at 114.

The Subcommittee Chair made a similar observation:

> We conduct these hearings against the backdrop of a booming stock market and a new generation of unseasoned investors. Hidden beneath the rising tide of the market, micro-cap fraud represents a pernicious undercurrent that potentially affects thousands of American families. Many of these families are, for the first time, investing their hard-earned money to save for skyrocketing tuition costs, unforeseen medical expenses, and lengthier retirements. While we have the safest and most successful capital markets in the world, the irony is that public confidence in our markets actually creates opportunities for con artists to exploit the unwary.

Id. at 55 (opening statement of Sen. Susan M. Collins).

Fraud is by no means limited to the micro-cap market. Rather, these hearing excerpts merely illustrate the problems faced by investors in many market sectors. More importantly, they underscore the importance of ensuring that investors subjected to these frauds have real access to the protections Congress provided for their benefit. This need is exacerbated by the relative lack of sophistication and high financial illiteracy of many investors who cannot realistically maintain the type of vigilance that the federal appellate courts require.

C. Individual Investors Have Extremely Low Levels of "Financial Literacy," Making Inquiry Notice Unreasonable.

Inquiry notice requires a determination of whether a plaintiff was alerted to facts which would cause a reasonable investor to investigate whether he or she had a claim. Rather than focusing on the underlying transaction and the merits of the claim, considerable resources will be spent debating whether certain factors should have placed a reasonable person on notice that something was amiss. The former Chairman of the SEC has warned that this "reasonable diligence" approach provides less clarity because of the difficulty in ascertaining whether someone should have discovered a fraud before he or she actually did. *See Securities Investor Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong. 22-25 (1991) (prepared testimony of Richard C. Breeden); *Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong. 28-30 (1991) (prepared testimony of Richard C. Breeden); Letter from Richard C. Breeden to Sen. Pete Domenici, *reprinted in* 138 Cong. Rec. at S23479 (Aug. 12, 1992). Such a requirement "is unfair to fraud victims because almost every defendant can allege that a plaintiff 'should have' discovered a fraud earlier." *See* Letter from Breeden to Domenici, 138 Cong. Rec. at S23480. Moreover, this standard "would prompt a considerable amount of needless litigation to resolve subtle shadings of what an investor could or might have done." *Id.* The complexity of the marketplace and the relative lack of sophistication of a majority of individual investors make it extremely difficult for investors to know when a change in their account is due to normal market fluctuations as opposed to fraudulent activity.

SEC Chairman Levitt recently said that Americans are in the "midst of a financial literacy crisis." Arthur Levitt, Remarks Before the Consumer Federation of America, *Expanding the Promise of Opportunity and Security Through Savings and Investing* 2 (Dec 3, 1998). He added that

> [t]ens of millions of Americans lack the basic saving and investing information they need to prepare for retirement or to meet other financial goals. . . . While 63 percent know the difference between a halfback and a quarterback, only 12 percent know the difference between a load and a no-load mutual fund.

Id.

He also has indicated that "financial literacy has not kept pace with the growth of fund investments or investor satisfaction." Arthur Levitt, Remarks to the Investment Company Institute 1 (May 15, 1998). He cited SEC research which indicates that less than half of mutual fund investors know that fund expenses are deducted on an ongoing basis, and only 8% said they completely understand the expenses that their funds charge. *Id.* at 2.

Several recent studies conducted by government agencies, financial services corporations, and non-profit organizations have produced remarkable findings that bear out his concerns. The studies took different approaches but reached the same conclusion: individual investors lack even the most rudimentary knowledge needed to make informed investment decisions. Investors do not know the basics of how investments work, and they do not even know what they are doing with their own money.

For example, a May 1996 study conducted by the National Association of Securities Dealers (NASD) found that while 78% of Americans can name a character on a television

sitcom, only 12% know the difference between a load and a no-load mutual fund. National Association of Securities Dealers, Inc., *NASD Launches Major Public Disclosure, Investor Education Initiative* 2 (Feb. 19, 1997). A mere 14% of investors surveyed could tell the difference between a growth stock and an income stock. *Id.*

Other findings are equally troubling:[2/]

- Just one-half (49%) of investors know that stocks have offered a better return during the last thirty years than bonds, certificates of deposit, or Treasury bills. Consumer Federation of America & Nations Bank, *Planning for the Future: Are Americans Prepared to Meet Their Financial Goals?* 13 (Apr. 1997).

- Almost one-third of mutual fund investors incorrectly believe that bonds have historically provided the best protection against inflation. Only 24% know that the price of long-term bonds would be more likely than short-term bonds to fluctuate in response to interest rate changes. Ruth Simon, *We Put Investors to the Test -- and, Boy Did They Ever Flunk*, Money, Mar. 1998 at 37 (reporting on results of Money/Vanguard Mutual Fund Literacy Test).

- One-third (32%) of those who participate in a 401(k) or other retirement savings plan think there is no risk associated with bonds, and 14% think there is no risk associated with an

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[2/] All cited reports on file with American Association of Retired Persons, Wash., D.C.

investment in a "mutual fund" or a "balanced" fund. Towers Perrin, *Preparing For Retirement: A Survey of 1,000 Working Americans* 9 (Feb. 1995).

- Only 15.7% of mutual fund investors understand that higher expenses can lead to lower returns, with almost 20% believing that mutual funds with higher expenses produce better results. Gordon J. Alexander, et al., *Mutual Fund Shareholders: Characteristics, Investor Knowledge, and Sources of Information* 13 (Dec. 1997).

- Six in ten investors do not know that higher risk investments often carry higher commissions, and four in ten are unaware that their initial investment is lowered by the amount of a broker's commission. American Association of Retired Persons, *Investor Awareness of Broker Compensation Practices: Findings From An AARP Survey, Executive Summary* 3-4 (Apr. 1998).

- Nearly one-half (46%) of Baby Boomers who own stocks and one-third of those who own mutual funds do not know what rate of return they are earning on their investments. Among retirees, the numbers jump to 55% of stock owners and 48% of mutual fund owners. The Equitable Life Assurance Society, *The Equitable Nest Egg Study* 12, tbls. 1 & 2 (June 1996).

- Four in ten (39%) participants in 401(k) or other retirement savings plans do not know how their money is allocated among the major asset classes. Towers Perrin, *Preparing For Retirement*, *supra*, at 9.

The only conclusion to be drawn from this sampling of findings is that individual investors do not know the ABCs of investing. Lacking this basic knowledge of how the securities markets operate, and being unaware of the fundamental features of their own investments, they cannot reasonably be expected to know that factors associated with the performance of their investments should lead them to investigate whether they have been defrauded. They are even less likely to know that their failure to investigate will preclude them from suing to recover monies they have lost to fraud. Yet, this is the heightened burden erected by the federal Circuit Courts that apply an inquiry notice standard.[3/]

CONCLUSION

The common practice among federal courts of appeal to use an inquiry notice, rather than an actual notice, standard to trigger the statute of limitations for actions brought under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 is contrary to this Court's holding in *Lampf*. This practice is more than merely a "modest and traditional exercise of judicial creativity." *Tregenza*, 12 F.3d at 722. Rather, it seriously undermines securities law enforcement to the detriment of thousands of individual investors. The existing statutory and regulatory protections must not be weakened by the appellate court rulings, which effectively reduce an already short limitations period. Moreover, by imposing an inquiry notice standard, the lower courts also are placing an unreasonable investigatory burden on individual

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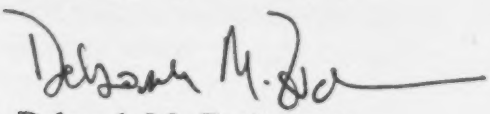
[3/] This untenable situation is exacerbated by what Circuit Courts consider adequate to place investors on notice. *See, e.g.*, *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) ("reasonable investor is presumed to have information available in the public domain . . . .").

investors, many of whom are unsophisticated with respect to the operations of the securities industry and the myriad of players and products involved in the market.

Amici respectfully urge this Court to grant a writ of *certiorari* in order to direct the lower courts to follow the clear language of this Court's mandate in *Lampf*.

Respectfully submitted,



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